Supreme Court, U.S.
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No. 09-381

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2009

JAMES CONSTANT,

Petitioner,

v.

Superior Court of the State of California, County of San Bernardino, S-35, Case No. SCVSS 096961

Court of Appeal of the State of California, 4th District Div 2 Consolidated Cases E044802 and E045320

Supreme Court of California Case S173448

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and Through the Department of Transportation, Real Party in Interest

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

Respondent, People of the State of California, ex rel. Department of Transportation Submits the Questions Presented by Petitioner are as Follows:

1. Petitioner's Statement of the issue presented by the Fifth Amendment goes beyond Rule 14 that the question stated should not be argumentative. Fairly stated, the question presented by Petitioner is whether California's Quick Take law deprived Petitioner of his 5th amendment right of just compensation for the taking.
2. Similarly, Petitioner's statement of the issue presented by the Fourteenth Amendment is prefaced by the assertion of alleged disparity in an eminent domain proceeding, such as this case, between the State and private owners due to the State's Quick Take law. Fairly stated, the question presented is, "Does the Quick Take Procedure deprive a property owner of his or her right of the equal protection guaranteed by the U.S. 14th Amendment?
3. In item 3 Petitioner asserts that in an eminent domain proceeding the property owner is faced with the property being taken without the owner's ability to prepare a defense to the taking. The question presented is: "Does the Quick Take procedure preclude any owner of the right to challenge the necessity of the taking under the 5th Amendment?

RE: THE OPINION OF THE COURT OF APPEAL, STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION TWO

Since most, if not all of Petitioner's contentions regarding the abuses in the Quick Take procedure were presented at the trial of the Eminent domain action and on Petitioner's appeal from the amount of compensation,

Respondent attaches in the Appendix a complete copy of the Decision of the Fourth Appellate District of California, filed on May 13, 2009. The Decision addresses virtually every critique raised by the Petitioner herein. contrary to Petitioner's assertion, the arguments presented by Petitioner on appeal from the State court judgment were not questions of first impression "repugnant to the U.S. Constitution and Federal law." (P. 9)

Although the Opinion is not certified for publication, pursuant to State Appellate Rule 8.115(b), an exception to citation applies where, as here, Petitioner has asserted objections to the Opinion at pp. 14-16 and presented a limited version of the Opinion in the Appendix at pp. 37-44. Accordingly, the exception provides an unpublished Opinion may be cited and relied on when the Opinion is relevant under the doctrines of law of the case and/or resjudicata.

RE: ALLEGED REASONS FOR GRANTING CERTIORARI

At pp. 9-10, Petitioner claims Respondent's deposit of probable Compensation was a "token deposit." However, Petitioner was unsuccessful in increasing the amount deposited for probable Compensation or in fixing the date of value as the date of trial. Neither Petitioner nor his brother Robert, moved to withdraw The $187,000 deposited so as to take advantage of adjustments for Rapid land increases and delay in payment of probable compensation.

Since the amount on deposit was available for withdrawal, Petitioner's assertion that the quick take procedure deprived him of valuation and payment is without merit. Likewise, Petitioner's claim the quick take procedure "afforded the State a means of acquiring property without a valid policy reason . . . in violation of constitutional requirements for due process, just compensation and equal treatment of

litigants" is without merit as discussed in the Court of Appeal Opinion under the Right-to-Take and Compensation Issues. (Opinion, 12–25)

PETITIONER'S OBJECTIONS TO THE OPINION OF THE COURT OF APPEAL, STATE OF CALIFORNIA

On page 14, Petitioner errs in citing p. 38 of the Court of Appeal Opinion regarding the deposit of probable compensation authorized in **Code of Civil Procedure** section 1255.010 (a) (b). Whether the deposit was in court or in the State Treasury, the deposit earned statutory interest until it was withdrawn (CCP sec. 1268.310). Petitioner also could immediately withdraw the deposit and/or move to determine or re-determine whether the amount deposited was the probable amount of compensation which would be awarded in the proceeding. **Code of Civil Procedure** sections 1255.030; 1255.210.

As to Petitioner's award of ½ interest in the judgment, he posits in ftn.5, "When one owner settles before trial, does awarding one-half of the verdict for one-half ownership of property deprive the non-Settling Owner's 5th Amendment right for just compensation"? However, in the Proceeding, the parties stipulated that Petitioner owned a ½ interest in the property with his brother. Therefore, Petitioner was entitled only to half the judgment as to the fair market value of the property taken. (Opinion, p. 38)

Petitioner contends the Opinion cited as *Aetna Life & Casualty Co.* (1985) 170 Cal.App.3d. 865, 877, approved the trial court's jury instruction CACI, No. 3515. Petitioner claims the approval affected the constitutionality of the CACI instruction. (P. 4, fn.6) The Aetna case was similar to the proceedings in Petitioner's case. The instruction, given, BAJI No. 1180, was a predecessor to CACI. As in this case, the trial court in Aetna directed a jury verdict on damages in an inverse action since the

verdict was based on the sole testimony of the plaintiff. Indeed, the statement of the appellate court at 876 quoted by Petitioner simply meant it was unnecessary to discuss the judgment NOV since the sole evidence of damages was from plaintiff's testimony.

After quoting from Aetna that ". . . the only type of evidence which can be used to establish value is the opinion of qualified experts and *property owners" Italics added Id.*, at 877. Petitioner asserts his evidence as a *property owner* was "precluded by the trial court and affirmed by the Appellate Court. The Appellate Court concluded ". . . the only expert's opinion on the value of the property was the State's expert." (Opinion, p. 34) Petitioner contends, "denying a party the right to testify or to offer evidence is reversible *per se",* Citing *Caldwell v. Caldwell* (1962) 204 Cal.App.2nd 819, 821. The case is hardly in point since it involved a divorce action in which the wife's testimony regarding costs of child support was excluded by the trial court.

Here, the Appellate Court in addressing the alleged preclusion of Petitioner's evidence found, ". . . Based on the record before us, Constant failed to comply with the statutory requirement of exchanging information with the State." Citing RE *Development Agency Of San Diego v. Attisha* (2005) 128 Cal.App.4th, 357, 378, the Appellate Court held, ". . . The requirement that parties in eminent domain proceedings must exchange expert witness information applies both to experts and owners who testify regarding value." As to Petitioner's Question 6, (p.15), the trial court's preclusion of Petitioner's valuation evidence resulted from Petitioner's failure to comply with exchange of valuation data which, as in most civil discovery provisions, is intended to take the "gaming" or "surprise" out of litigation.

ALLEGED REASONS FOR GRANTING THE WRIT

Petitioner Cites a number of federal cases in support of the contention that Federal law requires disregarding State authorities which are in conflict with the objectives of eminent domain law. (pp. 9 – et seq.) A leading case cited holding that under the 5th amendment a taking occurs when payment is made after trial is *Kirby Forest Industries Inc., v. United States* (1984) 467 US 1, 17-18. In *Kirby*, the property was valued at trial in 1979, but payment was not made until 1982. Due to the delay, this Court held the value must be modified when there is a substantial delay between the valuation date and the date the Judgment was paid. The State Supreme Court in *Mt. San Jacinto Community College Dist. v. Superior Court* (2007) 40 Cal.App.4th 648, distinguished *Kirby* in that the case was neither a Quick Taking nor a deposit of probable compensation prior to the taking. (*Mt. San Jacinto* at 662.)

Petitioner cites *Davis v. Wechsler* (1923) 263 US 22, 24 as holding that "Local rules or procedures must not discriminate against the federal law or affect the availability of a federal right and that Petitioner's just compensation cannot be made to depend [on] the State's deposit or JNOV based on State statutory Provisions." (P. 13) In *Davis*, this Court held that ". . . \whatever springs the state may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. (Id., at 24) However, the case involved neither eminent domain nor just compensation issues and did not support Petitioner's claim of California's eminent domain proceedings discriminating against Federal rights in this proceeding.

In *Seaboard Air Line Ry. US* (1923) 261 US 299, this Court's holding regarding payment of interest on the property valued as of the date possession was taken by the Agency comports with California's procedure.

Code of Civil Procedure section 1268.310 provides, "The compensation awarded in the Proceeding shall draw interest from the earliest of the following dates. . . c) The date after which the Plaintiff is authorized to take possession of the property as stated in an order for Possession."

PETITIONER WAS AFFORDED DUE PROCESS IN DISPUTING THE STATE'S RIGHT TO TAKE FOR THE PROJECT

Petitioner asserts "As shown by Appendices, the State courts below refused to hear Petitioner's Constitutional I claims under **Calif. Const. Art 1, sec. 19, U.S. Const. 5th and 14th Amendments." (p. 17)**

On the contrary, the Appellate Court addressed Petitioner's contentions that the trial court erred in granting the State's right to take and denying Petitioner's 3 motions on the issue. (Op. 3, 4-5) After the State filed its Complaint in Eminent Domain, owners Robert and Constant, then both represented by counsel, filed their answer raising, inter alia, the State's Right to Take.

The Right to Take was first addressed by the trial court Which ". . . after considering all briefing and argument by counsel" issued an order finding there was no abuse of discretion in taking the property. (Op., 4) This finding was disputed by Petitioner Appearing in Pro Per by filing 2 Petitions For Writ of Mandate in the Appellate Court objecting to the State's right to take and raising several issues claiming that the taking was improper. The Appellate Court denied the Writs and took judicial notice of Petitioner's filing of 4 Writs, Case numbers E037664, E039848, E037897 and, E038614. (Op. 5)

Further, the issue was addressed by the Appellate Court under the heading of "Right to Take Issues." (Op. pp. 12 et. seq.) After setting forth the additional background, the Court stated, "Where objections to the right

to take are raised, unless the Court orders otherwise, they shall be heard and determined prior to the determination of the issue of compensation." (Citing CCP sec. 1260.110, (a),

The Court cited *Inglewood Redevelopment Agency v. Aklilu* (2007) 153 Cal.App.4th 1095, 1114 in stating, "A person having an interest in property described in a resolution of necessity may obtain Judicial review of the validity of the resolution *before* the eminent domain action via a writ of mandate pursuant to section [CCP] 1085 or after the commencement of the eminent domain proceeding by objection to the right to take." (Op. p.15)

In sum, the Appellate Court concluded "Further, any issues regarding the taking of the property have already been adjudicated and Constant has provided absolutely no authority that would allow us to consider the right to take that was already rejected by the trial Court, this court, and the Supreme Court." (Op. p.17)

ADDENDUM RE: "OUTSIDE ATTORNEYS"

This is in reply to Petitioner's motion to enjoin the appearance of alleged outside attorneys for Respondent, the People of the State of California acting by and through the Department of Transportation (hereafter, the Department), received on October 20, 2009. The counsel identified by Petitioner on pp. 1-2 of the motion is not a list of outside attorneys, but a partial list of staff attorneys in the Los Angeles Office of the Department's Legal Division. Included in the list is Ronald W. Beals, Chief Counsel of the Legal Division in the Sacramento Office. The undersigned, Robert W. Vidor, is a Grade IV Deputy Attorney in the Legal Division who, as a member of the Bar of this Court has prepared and files herewith on behalf of the Department the Opposition to the Petition for Certiorari.

CONCLUSION

For the reasons set forth, in this Opposition, the Petition for Writ for Certiorari should be denied.

Respectfully submitted,

ROBERT W. VIDOR, Bar No. 30312

By Robert W. Vidor
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Attorneys for Respondent, The People of the State of California, acting by and through the Department of Transportation

CERTIFICATE OF COMPLIANCE
Rule 330 of Court

The undersigned counsel of record for Respondent certifies in reliance on the word count of the computer program used to prepare this Respondent's Brief in Opposition to Petition for Writ of Certiorari, that the Reply contains 2,414 words, in compliance with the above captioned Rule of Court.

Dated: October 27, 2009

Robert W. Vidor

DECLARATION OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 100 South Main Street, Suite 1300, Los Angeles, California 90012-3702.

On October 28, 2009, I served (a) true copy(ies) of the following document(s), **RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA**, on the interested party(ies) to the said action:

PLEASE SEE ATTACHED MAILING LIST

By the following means:

|X| BY MAIL: I am readily familiar with this office's practice of collection and processing correspondence and legal documents for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day in a sealed envelope with postage thereon fully prepaid at Los Angeles, in the ordinary course of business.

| | **OVERNIGHT MAIL**: By placing a true copy thereof, enclosed in a sealed envelope, to be delivered to the addressee(s) shown.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 28, 2009, at Los Angeles, California.

Lynda Eveza
Declarant

MAILING LIST

Re: The People of the State of California v. James Constant
San Bernardino County Case No. SCVSS 096961
Appeal Court Civil No. E046012, Cons. Case Nos. E044802 and E045320

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